CRIMINAL YEAR SEMINAR

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May 6, 2016 - Phoenix, Arizona
May 13, 2016 - Chandler, Arizona

2015 DUELING PERSPECTIVES: Prosecution & Defense

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CRIMINAL YEAR IN REVIEW – "Dueling Perspectives" Case Summaries[1]

1. ***State v. Almeida*** (8/15): D entitled to justification (crime prevention) instruction.

2. ***State v. Decker*** (1/16): Bullet could satisfy element of entry for purposes of burglary charge + *Batson*

3. ***State v. Fischer*** (10/15): Court's authority to grant motion for new trial.

4. ***State v. Holle*** (9/15): Lack of sexual interest is not an affirmative defense.

5. ***State v. Lee*** (8/15): Victims could not be interviewed about acts relating to other victims in the same case. Cf. *Romley v. Superior Court*, 172 Ariz. 232 (App. 1992).

6. ***State v. Leteve*** (8/15): *Miranda* public safety exception (D shot himself in face) + 404/prior ill will admissible in murder to prove motive + observation evidence/impulsivity.

7. ***State v. Maciel*** (9/15): Investigatory questions do not violate *Miranda* + corpus

8. ***State v. Neese*** (1/16): MCAO properly indicted a DNA profile & no prejudice from delay between charging and arrest.

9. ***State v. Ortiz*** (10/15): Dutton/cold expert + DNA/need not call every technician for analyst opinion.

10. ***State v. Padilla (Simcox)*** (12/15): ARS 13-1421(A)(5)/admissibility of previous touching as defense in molest case absent findings of falsehood + victim rights

11. ***State v. Romero*** (1/16): Exclusion of expert on experimental design to rebut firearm/toolmark testimony was error. + admissibility of F/T testimony

12. ***State v. Steinle*** (7/15): Special action denying State relief re preclusion of video because it had been cropped by the witness.

13. ***State v. Vassell*** (9/15): No justification instruction where defendant shot at SWAT

14. ***State v. Woods*** (5/15): Granting State's m/mistrial over D's objection improper unless manifest necessity (V yelled at D in court and later was arrested)

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[1] The opinions expressed in this handout and the accompanying presentation are the opinions of J. Mosher and/or R. McWhirter and do not represent the position of PCAO, APAAC, or any other entity or individual.

State v. Almeida, 238 Ariz. 77 (App. 2015) (Decided August 2015 by Division 2, trial judge Bernini, authoring judge Eckerstrom): Defendant was entitled to justification (crime prevention) instruction.

Facts: Almeida cuts off victim who slams on brakes, honks horn, tailgates Almeida, drives beside him, waives gun in air, scaring Almeida's fiancée who has their child in backseat. Victim then pulls next to passenger side of Almeida's vehicle at a stoplight; Almeida gets out with his own gun. Light turns green and Almeida drives away; victim chases him and runs two lights in the pursuit.

Issue: Court instructed on self-defense and defense of others but denied request for crime prevention instruction.

Held: Reversed and remanded. A rational juror could conclude victim was the aggressor and Almeida reasonably believed display of handgun at traffic light was immediately necessary to prevent ***another*** aggravated assault against himself or his passengers.

Key points:

- Bad facts make law, good or bad
- Would this really have affected the outcome; the jury found Almeida incredible, would they really analyze crime prevention differently from self-defense?
- Denial of justification instruction reviewed like a Rule 20= live by the sword, die by the sword!
- Crime doesn't need to be ongoing/"zone of danger"
- Self-defense and defense of others address use of force, whereas crime prevention is more permissive. It also raises a presumption of reasonableness under §13-411(C).
- "[T]he denial of a properly requested jury instruction under §13-411 will usually be reversible error, given the prejudice that naturally flows from the refusal to allow a distinct legal theory of defense." And it was here...

State v. Decker, 239 Ariz. 29 (App. 2016) (Decided January 2016 by Division 1, trial judge Gates, authoring judge Cattani): Bullet could satisfy element of entry for purposes of burglary charge (+ *Batson*).

Facts: Victim cuts Decker's face with a knife, so Decker returns to victim's front door and fires shots into the house, killing the victim. At trial, the jury unanimously finds both premeditated and felony murder, as well as first-degree burglary.

Issues: The State argued the bullet fired from the gun could establish the element on entry necessary to prove burglary.

Held: Affirmed. A bullet can be characterized as a tool or implement used to do work, that intrudes into the residence.

Key points:

- Instrument is not defined, so we look to common meaning; an implement used to do work.
- That another instrument accelerates the bullet does not change that the bullet is an instrument "that causes damage across the threshold."
- There is no requirement that the instrument be held in the hand or physically connected to the perpetrator, unlike previous versions of the burglary statute.
- Burglary statutes protect the security of the home and the person within the home, so this interpretation is consistent with the purpose of the statutes.
- Common law cases from other states have recognized projectile instruments.
- This prosecutor took an informed risk and made good law.

State v. Fischer, 238 Ariz. 309 (App. 2015) (Decided October 2015 by Div. 1, trial judge Mullins, authoring judge Gould): Court's authority to grant motion for new trial.

Facts: Defendant Fischer is a former police officer. He visited his step-daughter and her family for Christmas. Defendant and Lee Radder, his step-daughter's husband, stayed up drinking at the kitchen table after everyone went to bed. After 5 a.m., 911 got a call from Fischer; they arrive to find Defendant kneeling over the victim. The victim is dead from a contact gunshot wound to his right eye, and is holding Defendant's pistol with his thumb on the trigger. Defendant is convicted of 2nd degree murder.

Issues: The trial judge denied a motion for judgment of acquittal, finding sufficient evidence to support the verdict. Then, Fischer filed a motion for new trial, and the trial court granted the motion on the grounds the verdict was contrary to the weight of the evidence. The State moved to dismiss without prejudice to pursue an appeal, which the trial court granted.

Held: Reversed and remanded. The Court of Appeals first denied Fischer's claim that the appeal was moot because the case had been dismissed; finding it had the authority to reverse the order granting the motion for new trial and to return the case to the posture it was in before the trial court ruled on the motion for new trial.

Next, the Court of Appeals found the trial court abused its discretion in granting Defendant's motion for new trial under Rule 24.1(c). In ruling on a motion for new trial (unlike a motion for judgment as a matter of law), the trial court does not view the evidence in the light most favorable to sustaining the verdict and is permitted to weight the evidence and make credibility determinations. Thus, the court may set aside the verdict even if there is sufficient evidence. However, the judge may not set aside a verdict "merely because, if he had acted as a trier of fact, he would have reached a different result." The court must be mindful of the right to trial by jury and the integrity of the jury trial system. "[M]otions for new trial should be granted with great caution" and should be granted only where "the jury has reached a seriously erroneous result" and the verdict is a "miscarriage of justice." If the evidence fully sustains the conviction, it is an abuse of discretion to grant a new trial.

Key Points:

- There are limits to the trial judge's authority. By the time you finish reading this opinion, it seems clear the trial judge ruled in a result-oriented fashion, rather than based on the evidence introduced at trial. To wit:

- The trial court made factual findings not supported by the record, and failed to consider all the evidence in reaching its conclusions.

- The court erred in finding that if Fischer fired the gun, he would have left DNA on the gun. In fact, Fischer admitted he touched the gun hours before the shooting when he arrived at his step-daughter's house and disassembled the weapon to hide it from the children.

- The trial court erred in finding that the victim's "non-blood DNA" was found on the gun. There actually wasn't any testimony about "non-blood DNA."

- The trial court ignored that the victim's fingerprint on the trigger was a blood print, which supported the State's theory that Fischer placed Radder's hand on the gun after the fatal shot.

- The trial court concluded the gun was equally available to the victim and Fischer, a fact not supported by the record. Defendant brought the gun to the house, disassembled it and put it in his bag to hide from his grandchildren. There was no testimony the victim even knew where it was, and he was unfamiliar with guns. Defendant on the other hand was a retired police officer and knew how to assemble the gun.

- The trial court ignored the GSR evidence. The only GSR particle was on Defendant's shirt, with none on the victim.

- The trial court concluded the Defendant's statements were not worthy of any significant weight. In fact, Fischer told the police he was sleeping in the guest bedroom when the victim was shot, but the blood evidence so clearly established Fischer was at the kitchen table when the victim was shot, that defense counsel conceded this in his closing argument.

- The trial court failed to weigh the incriminating fact that Fischer washed his hands after the police told him not to do so. Fischer was not only a former police officer but a practicing attorney and the jury could reasonably concluded he washed his hands to eliminate incriminating DNA or GSR evidence.

- As if the above were not enough, the Court of Appeals spent many pages detailing how the trial court had overlooked or disregarded many aspects of the blood spatter testimony.

State v. Holle, 238 Ariz. 218 (App. 2015) (Decided September 2015 by Division 2, trial judge Nichols, authoring judge Vasquez): Lack of sexual interest is not an affirmative defense.

Facts: Victim disclosed that Jerry Holle, her grandfather, had touched her breasts, buttocks, and vagina on several occasions. Defendant objected to the statutory elements of the offense, claiming it put the burden on him to prove lack of sexual interest.

Issues: The jury was instructed that lack of sexual interest is an affirmative defense, and the burden to prove the affirmative defense by a preponderance of the evidence was on the defendant. The statute defines child molestation as "intentionally or knowingly engaging in or causing a person to engage in sexual contact..." In *State v. Simpson*, 217 Ariz. 326 (App. 2007), Division 1 decided that sexual interest is not an element of child molestation. In *Holle*, Division 2 addressed this same issue.

Held: Affirmed. "A person of ordinary or average intelligence would infer a fundamental connection exists between sexual interest" and the prohibited conduct. Because §13-1407(E) negates an element of the offense, it is not an affirmative defense. If a defendant satisfies "the burden of production" to raise the defense, then the state must prove beyond a reasonable doubt that the defendant's contact was motivated by a sexual interest.

The error was not structural so prejudice is not presumed. The reason it is not structural is it because omission of an element in a jury instruction does not "vitiate all the jury's findings," and is therefore subject to harmless error analysis. Under this standard, the state must show that no reasonable jury could find the element not proven beyond a reasonable doubt. Here, the record contained overwhelming evidence that Holle was motivated by sexual interest. This evidence came largely from his video-recorded statement, in which Holle admitted he showed the victim "about humping" and described "play acting" with her, wherein she pulled down her pants and he "rubbed up against her" buttocks with his covered penis.

Key Points:

No dueling perspectives here. "Sexual contact" includes any touching; so isn't a parent changing or drying a child committing the offense if we don't read some aspect of sexual interest or sexual motivation into the statue? Aren't our juries doing this anyway?

State v. Lee, 238 Ariz. 19 (App. 2015) (Decided August 2015 by Division 2, trial judge Lee, authoring judge Miller): Victims could not be interviewed about acts relating to other victims in the same case.

Facts: Defendant (Marshall Ray) was charged with sexual abuse/child molestation involving four victims, each of whom invoked. Because the victims knew each other, Ray claimed they may have spoken about him. Ray sought to compel interviews, arguing he was entitled so long as he didn't ask questions about the particular witness' victimization. The judge agreed and allowed the interviews, over the state's objection. The state sought special action relief.

Issues: Previously, §13-4433(A) gave victims the right to refuse interviews on any matter "that occurred on the same occasion as the offense against the victim." In *Champlin v. Sargeant*, 192 Ariz. 371 (1998), the Supreme Court held that eyewitness victims could be interviewed so long as they were not also the victim of the offense to which they were an eyewitness. The legislature then amended § 13-4433(A) to add language that allowed victims to refuse interviews in any matter filed in the same indictment or consolidated for trial. Defendant argued that *State v. Lee*, 226 Ariz. 234 (App. 2011), in which interviews of criminal victims were not allowed in a related civil forfeiture case, somehow meant that *Champlin* had overridden the plain statutory language.

Held: Vacated. The prior decision in *State v. Lee* was not controlling on these facts. Nor did that case hold that *Champlin* overrode the plain statutory language.

Key Points:

Be sure to review *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 239 (App. 1992). In *Roper* (which is cited in *Lee*), the Court of Appeals held "if the trial court determines that *Brady* and due process guarantees require disclosure of exculpatory evidence and, further, if the court determines that the medical records are exculpatory and are essential to presentation of the defendant's theory of the case, or necessary for impeachment of the victim ... then the defendant's due process right ... overcomes the statutory physician patient privilege on the facts as presented here, just as the due process right overcomes the Victim's Bill of Rights on these facts."

State v. Leteve, 237 Ariz. 516 (App. 2015) (Decided August 2015 by Supreme Court, trial judge O'Connor, authoring judge Bales): *Miranda* safety exception (D shot himself in face) + 404/prior ill will admissible in murder to prove motive + observation evidence/impulsivity.

Facts: Leteve cheats on his wife, then stalks her when she leaves him. After multiple acts reminiscent of Glen Close in *Fatal Attraction*, Leteve shoots his two young sons in the back of the head, killing them both, and shoots himself in the chin, which he survives. Affirmed.

Miranda/safety exception: When police arrived, they asked Leteve numerous pre-*Miranda* questions. "Here, the officers reasonably asked questions to assess what had occurred … to determine the nature of the injuries to those present, and to identify any remaining threats."

Rule 404(b)/other acts: The state also introduced evidence of his affairs, his stalking, and his being broke. "The challenged other acts evidence was admissible under Rule 404(b) to show Leteve's intent or motive. Leteve unpersuasively argues that his retaliatory actions against Laurie should not have been admitted because she was not the murder victim. ***We have long recognized that evidence of prior ill will or difficulties between a defendant and a murder victim may be relevant to show motive or premeditation.*** Here, the past difficulties between Leteve and Laurie were similarly relevant to his intent and motive in killing their sons. Evidence of Leteve's financial difficulties was relevant to his motive in attempting to commit suicide and to establishing that the killings were planned." (emphasis added).

Observation evidence/impulsivity: The trial court precluded a defense expert from testifying about Leteve's character trait for impulsivity, and limited Leteve's parents to testifying about impulsivity only the night before & the day of the murders. "That Dr. Morris did not observe Leteve's character trait on the night before or the day of the murders is not dispositive… Because Dr. Morris would have testified that Leteve had a general character trait for impulsivity, and not that he acted impulsively at the time of the murders, the trial court erred by excluding the testimony merely because the expert's observations were not contemporaneous with the crime… Were we to uphold such a restriction, it would effectively prohibit a defendant from offering any expert testimony about general behavioral characteristics that relate to the issue of premeditation…. The trial court likewise erred by placing temporal restrictions on the observation testimony by Leteve's parents." The error was harmless because of the overwhelming evidence of premeditation here.

Key Points: Rule 404(b) is a rule of inclusion, not exclusion and yes, prosecutors get to use it to introduce relevant, not unduly prejudicial evidence for a proper purpose. This is not "asking for trouble on appeal." Observation evidence is here to stay, so we must deal with it.

State v. Maciel, 238 Ariz. 200 (App. 2015) (Decided September 2015 by Division 1, trial judge Haws, authoring judge Jones): Investigatory questions do not violate *Miranda* + corpus

Facts: Maciel was found sitting next to a vacant building with a broken window. The first responding officer got Maciel's ID, patted him down for weapons, asked him what he was doing and how the board which had been covering the broken window had been removed. Maciel denied knowledge, and the officer asked him to sit in his patrol vehicle awaiting backup. After the other officer arrived, Maciel was asked to sit on the curb while the 2nd officer stood by. The pastor of a neighboring church arrived and said the board had been there three days before, so the officer again asked Maciel about the window, and Maciel admitted entering the building to look for money. Maciel was then arrested, *Mirandized*, and made additional inculpatory statements.

Held: Maciel was not in custody in the patrol car or at the curb. The first responding officer was the only officer on scene, didn't know if Maciel was involved in any crime, and didn't know if anyone else was inside the building. He asked Maciel to wait in the car in the interests of "both of our safety" and this was legitimate since they would both be in danger if an armed person emerged. Initial questions were reasonable "on-the-scene questioning" to assess the situation.

With respect to being asked to go from the car to the curb, Maciel wasn't handcuffed or arrested, no force was used "and "there was nothing coercive or inherently threatening about the curb itself." The curb-side questioning was only after new information from the pastor indicated the window had been boarded up three days before. Given the new information, it was not improper for the officer to attempt to further narrow the timeframe during which the board had been removed. Maciel then incriminated himself and questioning ceased.

Key Points:

- The appellate court deferred to the trial court's assessment of the officer's credibility, particularly given the lack of objective indicia of arrest.

- "[T]he record reflects the area remained an active crime scene. It was reasonable for the officer to control the movement of any persons within the area when he did not and could not have known who or what danger may have been inside."

- This was not a two-step interrogation process because Maciel was not in custody in the patrol car or at the curb. Plus, the officer wasn't trying to subvert *Miranda* by first questioning without it.

State v. Neese, 2016 WL 74933 (App. 2016) (Decided January 2016 by Division 1, trial judge Svoboda, authoring judge Orozco): MCAO properly indicted a DNA profile & no prejudice from delay between charging and arrest.

Facts: From 1999-2004, Scottsdale PD investigated numerous residential burglaries. They couldn't find the culprit, but they found a common DNA profile from the various scenes. In 2005, an indictment was filed charging John Doe with the burglaries and identifying John Doe as an unknown male matching the DNA profile. In May 2011, Robert Nesse's DNA was obtained, and it was determined to match the John Doe profile. Neese moved to dismiss the 12 counts which occurred before May 2004 as outside the 7 year statute of limitations.

Issues: Did the John Doe indictment toll the statue of limitations?

Held: "An indictment charging an unknown defendant must contain 'any name or description by which he can be identified with reasonable certainty.'" *See* comment to Rule of Criminal Procedure 13.2. The court agreed with opinions from other jurisdictions that a DNA profile satisfies the "with reasonable certainty" requirement. "We thus hold that for limitation purposes, a criminal prosecution commences upon the filing of a 'John Doe' indictment that identifies a defendant with a unique DNA profile."

Key Points:

- DNA profiles are actually not "unique," are they? They are statistically very unlikely to recur....
- Criminal statutes of limitations do not confer fundamental constitutional rights.
- Neese got notice of the charges when he was arraigned, so he has demonstrated no prejudice.

State v. Ortiz, 238 Ariz. 329 (App. 2015) (Decided October 2015 by Division 2, trial judge Chon-Lopez, authoring judge Howard): Dutton/cold expert + DNA/need not call every technician for analyst opinion.

Facts: Female victim J.V. joined wrestling team as a freshman and Ortiz was her coach. When she was 15 and he was 53, they engaged in sexual encounters. They were eventually caught while engaged in sexual activity, parked in Ortiz' mother's minivan, when police responded to a suspicious vehicle report. Ortiz was convicted on multiple counts and sentenced to 3.75 years. Affirmed.

Wendy Dutton/Cold Expert: Ortiz claimed the trial court improperly allowed testimony of Dr. Wendy Dutton on the general characteristics of child sexual abuse victims. Dutton testified as a cold expert on: (1) piecemeal disclosure, (2) underreporting, (3) circumstances of disclosure, (4) relationship to abuser (sexual abuse is more likely by someone the child knows), and (5) grooming. After a *Daubert* hearing, the trial court held Dutton was qualified as an expert under Rule 702 and the evidence passed 403 balancing. Ortiz argued on appeal Dutton's testimony is common knowledge and therefore her expert testimony is not admissible, but this was settled in *Lindsey*, 149 Ariz. 472 (1986); *see also, Salazar-Mercado,* 234 Ariz. 590.

Ortiz argued Dutton's testimony was more prejudicial than it was probative. He argued whether most abusers know their victims is irrelevant. The court found credibility was an issue and this helped debunk the myth that rape is predominately perpetrated by someone unknown to the victim. Piecemeal disclosure was probative because here the victim first only admitted to the act on the night the police caught Ortiz. With respect to underreporting, Ortiz argued this implied other incidents, but the testimony was underreporting as to a particular incident, not failing to report other incidents. Moreover, Dutton was cold and did not testify as to the abuse in this case. Grooming was relevant given J.V.'s testimony and the testimony of other witnesses about Ortiz' behavior toward J.V. (for example, "putting her foot in his mouth"). Her testimony about manner of disclosure was relevant, as here the disclosure was accidental/discovered.

Confrontation Clause/DNA Testimony: Ortiz claimed forensic analyst Emily Jeskie's testimony violated his confrontation clause rights because she relied on preparation and testing done by other technicians who did not testify. Jeskie reviewed data and wrote a report, but she did not conduct any of the genetic analysis. She reviewed the work of others to ensure proper procedures were followed and had herself performed the steps of the process on other occasions. This was consistent with *State v. Gomez*, 226 Ariz. 165 (2010), which approved the same DNA evidence as non-testimonial. The court distinguished Bullcoming as holding only that a sicnetific report cannot be introduced as substantive evidence without the testimony of the analyst who prepared and certified it.

State v. Padilla (Simcox), 238 Ariz. 560 (App. 2015) (Decided December 2015 by Division 1, trial judge Padilla, authoring judge Thumma): ARS 13-1421(A)(5) & admissibility of previous touching as defense in molest case absent findings of falsehood + victim rights

Facts: In this child molestation case involving 2 victims, the state sought to preclude pro se defendant from questioning one of the victims about prior allegations of sex abuse against someone else. The victim's mother objected, through counsel. The court indicated victim's mother was not representing the state so her objection "will be noted but that's about it." Victim's mother's counsel also filed a motion for protective order to preclude testimony from a doctor about the other reported incident, claiming it would violate her daughter's privacy rights. The court told victim counsel it was the prosecutor's job to argue the motion for protective order.

The defendant did not argue that the other allegation was false under A.R.S. § 13-1421(A)(5) but that the other allegation constituted "a third-party defense." Nevertheless, the trial court concluded Simcox could cross the victim about the other allegation. The State obtained a stay and filed petitions for special action.

Held: It was not clear whether the trial court found, as required by § 13-1421(A)(5), that the other allegation was relevant and material to a fact at issue. The trial court did not find the statement false. The trial court failed to address Rule 403 balancing. The trial court's ruling was vacated.

Also, victims, through counsel, have standing to seek an order from the superior court under §13-4437(A), which means an order to "enforce any right or to challenge an order denying any right guaranteed to victims." Rulings to the contrary were vacated.

Key Points:

- Is an accusation against someone else "evidence...of prior sexual conduct" under A.R.S. § 13-1421(A)(5)?

- Could a prior accusation which was not false inform the victim's view of the instant conduct? Could it affect his or her interpretation of the events? Should there be some discretion for courts to exercise if they encounter such circumstances?

State v. Romero, 239 Ariz. 6 (2016) (Decided January 2016 by Supreme Court, trial judge Bernini, authoring judge Bales): Exclusion of expert on experimental design to rebut firearm/toolmark testimony was error + admissibility of F/T testimony

Facts: In June 2000, the victim was killed by 2 gunshots. Police found 6 spent .40 caliber casings at the scene and a cell phone next to the body. Romero was found a month after a murder with a .40 caliber Glock magazine. Along the path he had traveled, police found the pistol itself. Seven years later, a cold case unit inspected the cell phone and it led them to Romero. TPD firearms expert Frank Powell compared the casings from the scene to test-fired casings from Romero's Glock and concluded Romero's weapon fired the casings.

At the first trial, the jury hung. At the retrial, Romero moved to preclude Powell from testifying and attempted to introduce testimony from Dr. Ralph Haber, an expert on experimental design, to question the reliability of toolmark comparisons. The trial court denied the motion to preclude Powell's testimony and granted the motion to preclude Haber's testimony. The court of appeals affirmed, holding Haber was not a qualified firearms identification expert.

Held: Judgment of Court of Appeals vacated in part and remanded. The issue is not whether Haber is a firearms identification expert (which he is not), but whether he was qualified in the area of experimental design. The issue was not whether Haber was as qualified or convincing as Powell but whether he is qualified and will offer reliable testimony that is helpful to the jury.

Haber's testimony that toolmark methods fall short of scientific standards was directed to the weight that should be placed on Powell's tests, and these questions of weight are for the jury.

The Supreme Court remanded to the Court of Appeals to determine if the error in excluding Haber's testimony is harmless.

Key Points:

- Hindsight is 20/20, but would it be better to ask Powell to address reliability, and cross Haber, than potentially have to re-try the case?

- Attacks on the science of firearm/toolmark identification are increasingly common. Your expert should be able to direct you to resources relevant for rebuttal.

State v. Steinle, 237 Ariz. 531 (App. 2015) (Decided July 2015 by Division 1, trial judge Steinle, authoring judge Orozco): Special action denying State relief re preclusion of video because it had been cropped by the witness.

Facts: Defendant Alejandra Moran attended a house party, and a fight broke out which ultimately led to a fatal stabbing. A witness, Hector Ponce, made a video recording of the fight and stabbing. Ponce cropped the first four and a half minutes from the video (the fight), and sent the final 31 seconds (the stabbing) to a friend, and deleted the original from his phone. Detectives could not recover the full video, and Moran moved to exclude the edited video under Rule 106 (completeness) and Rule 1001 (best evidence). The trial court granted the motion, and the State pursued special action relief.

Held: Relief denied. A video is a "statement" under Rule 106. The court relied on federal precedent in deciding Rule 106 applies to videos of "conduct." The edited portion of the video is relevant to Moran's defense because she argues the murder was provoked, not premeditated. Because this portion does not exist, the fairness element of Rule 106 cannot be satisfied.

Key Points:

- Justice Howe, in a well-written dissent, points out that "Rule 106 does not apply because the State has offered the entire video in evidence and no part or portion remains unadmitted that is necessary to provide context."
    - Rule 106 is a rule of admission, not exclusion: "The rule presupposes that the offered statement is an excerpt of a longer statement and that any false impression from admission of the offered statement can be cured by admission of the longer statement. The rule does not provide that if evidence was once a part of a longer statement, it can be excluded if the longer statement is not available. The majority cites no authority that interprets the rule this way."
    - "***The only authority the majority cites for its position is a New York federal district court decision, United States v. Yevakpor, in which the district court found the federal government at fault for destroying a surveillance video*** after excerpting certain segments for use at trial.... The district court recognized that the critical factor in determining whether to preclude the preserved segments was whether the government was at fault, and held that ***the government's intentional destruction of the video warranted preclusion of the segments.***" (emphasis added).

State v. Vassell, 238 Ariz. 281 (App. 2015) (Decided September 2015 by Division 2, trial judge Nichols, authoring judge Miller): No justification instruction where defendant shot at SWAT.

Facts: TPD obtained a no-knock warrant and a SWAT team executed it. The officers repeatedly announce that they are police, including over a loudspeaker and in English and Spanish. At some point, they saw Vassell crouching, then standing, holding a rifle. He ran to a hallway, lifted the rifle and pointed it as the officers. An officer tried to deploy a flash/bang, accidentally fired his rifle, then deployed the flash/bang. Vassell then fired shots. Police surround the house, and Vassell eventually surrenders.

After an officer testified that criminals frequently impersonate police officers during home invasions, Vassell sought a justification instruction. The trial court denied the request because police used only lawful force. Defendant was convicted of endangerment.

Held: Affirmed. "Where, as here, a defendant claims self-defense to justify his use of physical force against a peace officer who was using lawful force, the slightest evidence that the defendant actually believed the individual was not a peace officer is required to support a justification instruction… Mere speculation that a defendant might have believed the individual not to be a peace officer is insufficient."

"Vassell's mistaken identity argument finds no support in the record. For instance, there is no evidence that he believed home invaders sometimes impersonate police, nor that he actually thought the SWAT team members to be home invaders when he fired two shots from the hall bathroom. The absence of " 'the slightest evidence' " to that effect is dispositive."

"[E]ven under his theory, Vassell knew there was at least a real and significant possibility he was shooting at actual police officers. Section 13–404(B)(2) explicitly rejects justification as a defense where a person has such knowledge absent unlawful physical force by the officer."

Key Points:

- Compare this to *Almeida* and decide which fits your case.
- It seems unlikely that the result would have been different had the jury been instructed on justification…

State v. Woods, 237 Ariz. 214 (App. 2015) (Decided May 2015 by Division 2, trial judges Littrell, Kelliher, authoring judge Kelly): Granting State's motion for mistrial over D's objection improper unless manifest necessity (V yelled at D in court and later was arrested).

Facts: Tywan Woods held the female victim, L.C., her four daughters, her boyfriend, three of his friends captive at gunpoint while his friends stole marijuana and other items. The first trial resulted in a hung jury.

"At Woods's second trial, L.C. frequently used profanity in her testimony and expressed extreme contempt for the men who had held her children captive. While one of her daughters was testifying, L.C. interrupted the questioning. Woods's counsel asked the court to admonish L.C., and the court told her, 'You need to keep quiet.' L.C. responded that she would leave the courtroom, but before leaving, accused Woods of holding her children 'hostage,' and directed profanity and a racial epithet toward him. Woods moved for a mistrial...[t]he state responded that L.C. had not said 'anything different than what she said on the stand.' The trial court agreed.... The next day, before the jury was brought in, the trial court stated there had been 'matters that happened outside of the presence of the jury that are of concern.' Woods's counsel told the court there had been 'commotions going on outside' the courtroom after L.C. left.... The court stated it believed the jury 'could probably also hear yelling and banging and some noise from outside.' ... The court stated it understood L.C. had been arrested later near the courthouse, and the court reporter nodded affirmatively when asked whether she had heard two jurors 'discussing that the person being arrested ... was [L.C.].' The state moved for a mistrial... Woods stated that he 'would prefer to continue with the trial.' ... The court then granted without prejudice the state's motion for a mistrial without making a specific finding that there was manifest necessity for its ruling."

Woods was convicted at a third trial.

Issues: Woods claimed the trial court erred in declaring the mistrial at trial #2, and therefore trial #3 violated his right against double jeopardy. Because he had not objected, review was for fundamental error.

Held: Reversed and remanded for dismissal ***with prejudice***. "Our supreme court has stated that when the trial court fails to make a 'real effort to determine whether there were any feasible alternatives to declaring a mistrial,' there is no manifest necessity for a mistrial. Here, the court could have but did not ask the jurors whether any extraneous information might have come to their attention."

Key Points:

- The court had options it did not use; e.g., find out exactly who saw what, and if jurors could remain fair and impartial, curative instruction & admonishment.

State v. Maciel, 238 Ariz. 200 (App. 2015) (Decided September 2015 by Division 1, trial judge Haws, authoring judge Jones): Investigatory questions do not violate *Miranda* + corpus

Facts: Maciel was found sitting next to a vacant building with a broken window. The first responding officer got Maciel's ID, patted him down for weapons, asked him what he was doing and how the board which had been covering the broken window had been removed. Maciel denied knowledge, and the officer asked him to sit in his patrol vehicle awaiting backup. After the other officer arrived, Maciel was asked to sit on the curb while the 2nd officer stood by. The pastor of a neighboring church arrived and said the board had been there three days before, so the officer again asked Maciel about the window, and Maciel admitted entering the building to look for money. Maciel was then arrested, *Mirandized*, and made additional inculpatory statements.

Held: Maciel was not in custody in the patrol car or at the curb. The first responding officer was the only officer on scene, didn't know if Maciel was involved in any crime, and didn't know if anyone else was inside the building. He asked Maciel to wait in the car in the interests of "both of our safety" and this was legitimate since they would both be in danger if an armed person emerged. Initial questions were reasonable "on-the-scene questioning" to assess the situation.

With respect to being asked to go from the car to the curb, Maciel wasn't handcuffed or arrested, no force was used "and "there was nothing coercive or inherently threatening

State v. Neese, 2016 WL 74933 (App. 2016) (Decided January 2016 by Division 1, trial judge Svoboda, authoring judge Orozco): MCAO properly indicted a DNA profile & no prejudice from delay between charging and arrest.

Facts: From 1999-2004, Scottsdale PD investigated numerous residential burglaries. They couldn't find the culprit, but they found a common DNA profile from the various scenes. In 2005, an indictment was filed charging John Doe with the burglaries and identifying John Doe as an unknown male matching the DNA profile. In May 2011, Robert Nesse's DNA was obtained, and it was determined to match the John Doe profile. Neese moved to dismiss the 12 counts which occurred before May 2004 as outside the 7 year statute of limitations.

Issues: Did the John Doe indictment toll the statue of limitations?

Held: "An indictment charging an unknown defendant must contain 'any name or description by which he can be identified with reasonable certainty.'" *See* comment to Rule of Criminal Procedure 13.2. The court agreed with opinions from other jurisdictions that a DNA profile satisfies the "with reasonable certainty" requirement. "We thus hold that for limitation purposes, a criminal prosecution commences upon the filing of a 'John Doe' indictment that identifies a defendant with a unique DNA profile."

Key Points:

- DNA profiles are actually not "unique," are they? They are statistically very unlikely to recur....
- Criminal statutes of limitations do not confer fundamental constitutional rights.
- Neese got notice of the charges when he was arraigned, so he has demonstrated no prejudice.

State v. Ortiz, 238 Ariz. 329 (App. 2015) (Decided October 2015 by Division 2, trial judge Chon-Lopez, authoring judge Howard): Dutton/cold expert + DNA/need not call every technician for analyst opinion.

Facts: Female victim J.V. joined wrestling team as a freshman and Ortiz was her coach. When she was 15 and he was 53, they engaged in sexual encounters. They were eventually caught while engaged in sexual activity, parked in Ortiz' mother's minivan, when police responded to a suspicious vehicle report. Ortiz was convicted on multiple counts and sentenced to 3.75 years. Affirmed.

Wendy Dutton/Cold Expert: Ortiz claimed the trial court improperly allowed testimony of Dr. Wendy Dutton on the general characteristics of child sexual abuse victims. Dutton testified as a cold expert on: (1) piecemeal disclosure, (2) underreporting, (3) circumstances of disclosure, (4) relationship to abuser (sexual abuse is more likely by someone the child knows), and (5) grooming. After a *Daubert* hearing, the trial court held Dutton was qualified as an expert under Rule 702 and the evidence passed 403 balancing. Ortiz argued on appeal Dutton's testimony is common knowledge and therefore her expert testimony is not admissible, but this was settled in *Lindsey*, 149 Ariz. 472 (1986); *see also, Salazar-Mercado,* 234 Ariz. 590.

Ortiz argued Dutton's testimony was more prejudicial than it was probative. He argued whether most abusers know their victims is irrelevant. The court found credibility was an issue and this helped debunk the myth that rape is predominately perpetrated by someone unknown to the victim. Piecemeal disclosure was probative because here the victim first only admitted to the act on the night the police caught Ortiz. With respect to underreporting, Ortiz argued this implied other incidents, but the testimony was underreporting as to a particular incident, not failing to report other incidents. Moreover, Dutton was cold and did not testify as to the abuse in this case. Grooming was relevant given J.V.'s testimony and the testimony of other witnesses about Ortiz' behavior toward J.V. (for example, "putting her foot in his mouth"). Her testimony about manner of disclosure was relevant, as here the disclosure was accidental/discovered.

Confrontation Clause/DNA Testimony: Ortiz claimed forensic analyst Emily Jeskie's testimony violated his confrontation clause rights because she relied on preparation and testing done by other technicians who did not testify. Jeskie reviewed data and wrote a report, but she did not conduct any of the genetic analysis. She reviewed the work of others to ensure proper procedures were followed and had herself performed the steps of the process on other occasions. This was consistent with *State v. Gomez*, 226 Ariz. 165 (2010), which approved the same DNA evidence as non-testimonial. The court distinguished Bullcoming as holding only that a sicnetific report cannot be introduced as substantive evidence without the testimony of the analyst who prepared and certified it.

State v. Padilla (Simcox), 238 Ariz. 560 (App. 2015) (Decided December 2015 by Division 1, trial judge Padilla, authoring judge Thumma): ARS 13-1421(A)(5) & admissibility of previous touching as defense in molest case absent findings of falsehood + victim rights

Facts: In this child molestation case involving 2 victims, the state sought to preclude pro se defendant from questioning one of the victims about prior allegations of sex abuse against someone else. The victim's mother objected, through counsel. The court indicated victim's mother was not representing the state so her objection "will be noted but that's about it." Victim's mother's counsel also filed a motion for protective order to preclude testimony from a doctor about the other reported incident, claiming it would violate her daughter's privacy rights. The court told victim counsel it was the prosecutor's job to argue the motion for protective order.

The defendant did not argue that the other allegation was false under A.R.S. § 13-1421(A)(5) but that the other allegation constituted "a third-party defense." Nevertheless, the trial court concluded Simcox could cross the victim about the other allegation. The State obtained a stay and filed petitions for special action.

Held: It was not clear whether the trial court found, as required by § 13-1421(A)(5), that the other allegation was relevant and material to a fact at issue. The trial court did not find the statement false. The trial court failed to address Rule 403 balancing. The trial court's ruling was vacated.

Also, victims, through counsel, have standing to seek an order from the superior court under §13-4437(A), which means an order to "enforce any right or to challenge an order denying any right guaranteed to victims." Rulings to the contrary were vacated.

Key Points:

- Is an accusation against someone else "evidence…of prior sexual conduct" under A.R.S. § 13-1421(A)(5)?

- Could a prior accusation which was not false inform the victim's view of the instant conduct? Could it affect his or her interpretation of the events? Should there be some discretion for courts to exercise if they encounter such circumstances?

State v. Romero, 239 Ariz. 6 (2016) (Decided January 2016 by Supreme Court, trial judge Bernini, authoring judge Bales): Exclusion of expert on experimental design to rebut firearm/toolmark testimony was error + admissibility of F/T testimony

Facts: In June 2000, the victim was killed by 2 gunshots. Police found 6 spent .40 caliber casings at the scene and a cell phone next to the body. Romero was found a month after a murder with a .40 caliber Glock magazine. Along the path he had traveled, police found the pistol itself. Seven years later, a cold case unit inspected the cell phone and it led them to Romero. TPD firearms expert Frank Powell compared the casings from the scene to test-fired casings from Romero's Glock and concluded Romero's weapon fired the casings.

At the first trial, the jury hung. At the retrial, Romero moved to preclude Powell from testifying and attempted to introduce testimony from Dr. Ralph Haber, an expert on experimental design, to question the reliability of toolmark comparisons. The trial court denied the motion to preclude Powell's testimony and granted the motion to preclude Haber's testimony. The court of appeals affirmed, holding Haber was not a qualified firearms identification expert.

Held: Judgment of Court of Appeals vacated in part and remanded. The issue is not whether Haber is a firearms identification expert (which he is not), but whether he was qualified in the area of experimental design. The issue was not whether Haber was as qualified or convincing as Powell but whether he is qualified and will offer reliable testimony that is helpful to the jury.

Haber's testimony that toolmark methods fall short of scientific standards was directed to the weight that should be placed on Powell's tests, and these questions of weight are for the jury.

The Supreme Court remanded to the Court of Appeals to determine if the error in excluding Haber's testimony is harmless.

Key Points:

- Hindsight is 20/20, but would it be better to ask Powell to address reliability, and cross Haber, than potentially have to re-try the case?

- Attacks on the science of firearm/toolmark identification are increasingly common. Your expert should be able to direct you to resources relevant for rebuttal.

State v. Steinle, 237 Ariz. 531 (App. 2015) (Decided July 2015 by Division 1, trial judge Steinle, authoring judge Orozco): Special action denying State relief re preclusion of video because it had been cropped by the witness.

Facts: Defendant Alejandra Moran attended a house party, and a fight broke out which ultimately led to a fatal stabbing. A witness, Hector Ponce, made a video recording of the fight and stabbing. Ponce cropped the first four and a half minutes from the video (the fight), and sent the final 31 seconds (the stabbing) to a friend, and deleted the original from his phone. Detectives could not recover the full video, and Moran moved to exclude the edited video under Rule 106 (completeness) and Rule 1001 (best evidence). The trial court granted the motion, and the State pursued special action relief.

Held: Relief denied. A video is a "statement" under Rule 106. The court relied on federal precedent in deciding Rule 106 applies to videos of "conduct." The edited portion of the video is relevant to Moran's defense because she argues the murder was provoked, not premeditated. Because this portion does not exist, the fairness element of Rule 106 cannot be satisfied.

Key Points:

- Justice Howe, in a well-written dissent, points out that "Rule 106 does not apply because the State has offered the entire video in evidence and no part or portion remains unadmitted that is necessary to provide context."
    - Rule 106 is a rule of admission, not exclusion: "The rule presupposes that the offered statement is an excerpt of a longer statement and that any false impression from admission of the offered statement can be cured by admission of the longer statement. The rule does not provide that if evidence was once a part of a longer statement, it can be excluded if the longer statement is not available. The majority cites no authority that interprets the rule this way."
    - "***The only authority the majority cites for its position is a New York federal district court decision, United States v. Yevakpor, in which the district court found the federal government at fault for destroying a surveillance video*** after excerpting certain segments for use at trial.... The district court recognized that the critical factor in determining whether to preclude the preserved segments was whether the government was at fault, and held that ***the government's intentional destruction of the video warranted preclusion of the segments.***" (emphasis added).

State v. Vassell, 238 Ariz. 281 (App. 2015) (Decided September 2015 by Division 2, trial judge Nichols, authoring judge Miller): No justification instruction where defendant shot at SWAT.

Facts: TPD obtained a no-knock warrant and a SWAT team executed it. The officers repeatedly announce that they are police, including over a loudspeaker and in English and Spanish. At some point, they saw Vassell crouching, then standing, holding a rifle. He ran to a hallway, lifted the rifle and pointed it as the officers. An officer tried to deploy a flash/bang, accidentally fired his rifle, then deployed the flash/bang. Vassell then fired shots. Police surround the house, and Vassell eventually surrenders.

After an officer testified that criminals frequently impersonate police officers during home invasions, Vassell sought a justification instruction. The trial court denied the request because police used only lawful force. Defendant was convicted of endangerment.

Held: Affirmed. "Where, as here, a defendant claims self-defense to justify his use of physical force against a peace officer who was using lawful force, the slightest evidence that the defendant actually believed the individual was not a peace officer is required to support a justification instruction… Mere speculation that a defendant might have believed the individual not to be a peace officer is insufficient."

"Vassell's mistaken identity argument finds no support in the record. For instance, there is no evidence that he believed home invaders sometimes impersonate police, nor that he actually thought the SWAT team members to be home invaders when he fired two shots from the hall bathroom. The absence of " 'the slightest evidence' " to that effect is dispositive."

"[E]ven under his theory, Vassell knew there was at least a real and significant possibility he was shooting at actual police officers. Section 13–404(B)(2) explicitly rejects justification as a defense where a person has such knowledge absent unlawful physical force by the officer."

Key Points:

- Compare this to *Almeida* and decide which fits your case.
- It seems unlikely that the result would have been different had the jury been instructed on justification…

State v. Woods, 237 Ariz. 214 (App. 2015) (Decided May 2015 by Division 2, trial judges Littrell, Kelliher, authoring judge Kelly): Granting State's motion for mistrial over D's objection improper unless manifest necessity (V yelled at D in court and later was arrested).

Facts: Tywan Woods held the female victim, L.C., her four daughters, her boyfriend, three of his friends captive at gunpoint while his friends stole marijuana and other items. The first trial resulted in a hung jury.

"At Woods's second trial, L.C. frequently used profanity in her testimony and expressed extreme contempt for the men who had held her children captive. While one of her daughters was testifying, L.C. interrupted the questioning. Woods's counsel asked the court to admonish L.C., and the court told her, 'You need to keep quiet.' L.C. responded that she would leave the courtroom, but before leaving, accused Woods of holding her children 'hostage,' and directed profanity and a racial epithet toward him. Woods moved for a mistrial...[t]he state responded that L.C. had not said 'anything different than what she said on the stand.' The trial court agreed.... The next day, before the jury was brought in, the trial court stated there had been 'matters that happened outside of the presence of the jury that are of concern.' Woods's counsel told the court there had been 'commotions going on outside' the courtroom after L.C. left.... The court stated it believed the jury 'could probably also hear yelling and banging and some noise from outside.' ... The court stated it understood L.C. had been arrested later near the courthouse, and the court reporter nodded affirmatively when asked whether she had heard two jurors 'discussing that the person being arrested ... was [L.C.].' The state moved for a mistrial... Woods stated that he 'would prefer to continue with the trial.' ... The court then granted without prejudice the state's motion for a mistrial without making a specific finding that there was manifest necessity for its ruling."

Woods was convicted at a third trial.

Issues: Woods claimed the trial court erred in declaring the mistrial at trial #2, and therefore trial #3 violated his right against double jeopardy. Because he had not objected, review was for fundamental error.

Held: Reversed and remanded for dismissal ***with prejudice***. "Our supreme court has stated that when the trial court fails to make a 'real effort to determine whether there were any feasible alternatives to declaring a mistrial,' there is no manifest necessity for a mistrial. Here, the court could have but did not ask the jurors whether any extraneous information might have come to their attention."

Key Points:

- The court had options it did not use; e.g., find out exactly who saw what, and if jurors could remain fair and impartial, curative instruction & admonishment.